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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 CHRISTOPHER LORENZO, suing
12 individually and on behalf of all others
similarly situated,

13 Plaintiff,

14 vs.

14 QUALCOMM INCORPORATED, a
15 Delaware corporation,

16 Defendant.

CASE NO. 08cv2124 WQH (POR)

ORDER

17 HAYES, Judge:

18 The matter before the Court is the Motion to Dismiss Plaintiff's Complaint (Doc. # 14)
19 filed by Defendant Qualcomm Incorporated.

20 **Factual Allegations in the Complaint**

21 A. **The Parties**

22 On November 18, 2008, Plaintiff Christopher Lorenzo initiated this action by filing the
23 Complaint (Doc. # 1). Plaintiff is a resident of Los Angeles County, CA. *Complaint*, ¶ 9.
24 Plaintiff purchased a Palm Treo 700Wx and a Blackberry Curve from Verizon and receives
25 cellular service from Verizon. *Id.*, ¶ 10. Defendant Qualcomm Incorporated ("Qualcomm")
26 is a Delaware corporation with its principal place of business in San Diego, CA. *Id.*, ¶ 11.
27 Qualcomm "is the second-biggest maker of mobile-phone chips and holds more than 1,400
28 patents which it licenses to more than 130 companies, including chip makers and cell phone
manufacturers." *Id.*

1 B. The Wireless Industry

2 Cell phones today “principally use one of two leading wireless technologies: either the
3 Global System for Mobility (‘GSM’) or the Code Division Multiple Access (‘CDMA’).” *Id.*,
4 ¶ 12. These GSM and CDMA systems “have unique features and technology, thus neither the
5 systems, nor the phones used for each system are interchangeable or substitutes - a GSM phone
6 will not work on a CDMA network and vice versa.” *Id.* The “chipsets that operate cell phones
7 must conform to the technology for the system for which the phone is being manufactured.”
8 *Id.*, ¶ 13. As the technologies evolve, they are referred to by “generations.” *Id.* The GSM and
9 CDMA pathways evolve independently. *Id.*

10 C. Qualcomm’s Patents and Licensing Practices

11 “Qualcomm holds certain patents that it asserts are ‘essential’ to the CDMA technology
12 and standard and, according to Qualcomm, the CDMA standard cannot be practiced without
13 using Qualcomm technology based on its patents.” *Id.*, ¶ 15. Standard setting organizations
14 (“SDO’s”) adopted CDMA as a standard technology for a new generation of phones such that
15 “any company that wanted to produce a CDMA compliant product had to pay licensing fees
16 to Qualcomm for use of its CDMA intellectual property rights.” *Id.*, ¶ 29.

17 By virtue of its patents of certain CDMA intellectual property rights and
18 incorporation and adoption by CDMA standards rendering such patents
19 ‘essential’ to the manufacture of CDMA-complaint devices, Qualcomm had and
20 continues to exercise market and monopoly power in the relevant CDMA patent
21 technology market - a market separate and distinct from the CDMA-chipset
22 market. . . .

23 Qualcomm has used that power over CDMA technology to obtain and protect
24 monopoly power in the CDMA chipset market.

25 *Id.*, ¶¶ 30-31.

26 “In at least some manufacturer licenses, Qualcomm substantially reduces royalty rates
27 when a licensee agrees to purchase Qualcomm chipsets exclusively.” *Id.*, ¶ 31. For example,
28 Qualcomm’s “patent licensing agreements with Chinese cell phone manufacturers are
expressly discriminatory and explicitly linked to those manufacturers’ use of Qualcomm
chipsets.” *Id.* Qualcomm has “publicly summarized” that the royalty rates provided to certain
Chinese manufacturers “are more favorable than our standard rates,” partly because these

1 manufacturers agree to use Qualcomm's chipsets. *Id.*, ¶ 32. Qualcomm's "royalty rate
2 discrimination furthers no legitimate competitive interest or business need," but rather "is
3 intended to harm, and has the effect of harming, competition in the CDMA chipset market and
4 the CDMA device market." *Id.*, ¶ 33. Qualcomm's royalty rate discrimination also violates
5 Qualcomm's commitments to the SDOs to license its CDMA intellectual property rights on
6 fair, reasonable, and non-discriminatory ("FRAND") terms. *Id.*, ¶ 35.

7 Qualcomm collects double royalties through insisting "on licenses at both the
8 component and the cell phone level." *Id.*, ¶ 39.

9 CDMA cell phone manufacturers pay a royalty to Qualcomm for rights
10 including the right to make (or to have made) and use CDMA chipset[s] in
11 CDMA-complaint cell phones to be sold by the licensee. Cell phone
12 manufacturer licensees pay the same royalty rate per handset regardless of
13 whether they make (or have made) their own customized CDMA chipsets or buy
from a CDMA chipset manufacturer that is licensed by Qualcomm. Thus, when
a CDMA chipset cell phone manufacturer buys a CDMA chipset from a
Qualcomm licensee, both the handset manufacturer and the chipset manufacturer
are paying a royalty to Qualcomm for the right to make the chipset.

14 *Id.*, ¶ 41. This "royalty rate scheme enables [Qualcomm] inappropriately to charge twice for
15 the same intellectual property right." *Id.*, ¶ 40. Qualcomm's efforts to collect double royalties
16 compels "each customer to negotiate with Qualcomm for a separate license, even if that
17 customer wants to purchase chipsets from a source other than Qualcomm;" violates
18 Qualcomm's commitments to license its CDMA intellectual property rights on FRAND terms;
19 and violates the "patent exhaustion doctrine by collecting and requiring CDMA component and
20 handset manufacturers to pay twice for the same license." *Id.*, ¶¶ 42-44.

21 "Qualcomm has protected its interests through non-disclosure agreements that prohibit
22 parties to its CDMA licensing agreements from disclosing confidential information, including
23 its discriminatory royalty rate pricing structure." *Id.*, ¶ 45. Qualcomm's "secret allowance of
24 . . . unearned discounts is for the purpose of, and had the effect of, injuring and eliminating
25 competition in the CDMA chipset market." *Id.*, ¶ 47.

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1 D. Harm to Plaintiff

2 Plaintiff is an end consumer of the CDMA chipset market. . . .

3 Plaintiff has suffered harm from Qualcomm's anticompetitive CDMA licensing
4 practices. CDMA chipset manufacturers suffer direct anticompetitive harm from
5 Qualcomm's CDMA licensing practices. This anticompetitive harm includes
6 supracompetitive prices and impaired non-price competition in innovation of
7 CDMA functionality. . . . CDMA chipset manufacturers pass CDMA licensing
8 costs down to CDMA device manufacturers, CDMA device manufacturers pass
9 those costs down to their vendors, and the vendors ultimately pass those costs
10 on to end consumers, such as Plaintiff.

11 *Id.*, ¶¶ 23-24.

12 E. Claims for Relief

13 Claim I: Violation of California's Cartwright Act, section 16720, *et seq.*, of the
14 California Business and Professions Code

15 Qualcomm and its licensees "formed a combination of capital, skill and/or acts by two
16 or more persons for the purpose of creating restrictions and preventing competition in
17 manufacturing, making, sale and/or purchase of CDMA chipsets and devices containing such
18 chipsets." *Id.*, ¶ 67. Qualcomm's "CDMA licensing practices constitute a trust in violation
19 of the Cartwright Act, even if Qualcomm's commitment to FRAND licensing was not
20 intentionally false at the time it was made and Qualcomm created a trust by simply reneging
21 on its commitment to FRAND licensing for the CDMA patents and engaging in the
22 discriminatory and exclusive licensing practices alleged herein." *Id.*, ¶ 68. Qualcomm's
23 CDMA licensing practices "have caused antitrust injury . . . and threaten additional antitrust
24 injury if [] allowed to continue" in the form of supracompetitive prices and impaired non-price
25 competition in the form of deterred innovation. Qualcomm's conduct constitutes a
26 combination in restraint of trade.

27 Qualcomm also "has required and coerced through discriminatory royalty rates that
28 anyone who wants favorable royalty rates on its CDMA patent technology . . . to also agree
29 to exclusively purchase Qualcomm's CDMA chipsets." *Id.*, ¶ 75. "The effect of Qualcomm's
30 discriminatory pricing and tying arrangements had been to substantially harm competition in
31 the market for CDMA chipsets." *Id.*, ¶ 78. Plaintiff and the class "have suffered antitrust
32 injury as downstream indirect purchasers who paid supracompetitive prices for CDMA-

complaint devices and/or cellular service as a result of Qualcomm's licensing practices." *Id.*,

¶ 80. Qualcomm's conduct constitutes discriminatory pricing and tying.

Claim II: Violation of California's Unfair Practices Act, section 17000, *et seq.*, of the California Business and Professions Code

"Qualcomm's licensing practices, coupled with corresponding non-disclosure provisions . . . constitute the secret payment or allowance of rebates, refunds, commissions, or unearned discounts." *Id.*, ¶ 82. "The payment or allowance of such discriminatory and secret royalty rates conditioned on exclusive dealing provisions and agreements not to purchase CDMA-chipset[s] from other competitor suppliers has a tendency to destroy competition." *Id.*, ¶ 84. Plaintiff and the class "have suffered antitrust injury as downstream indirect purchasers who paid supracompetitive prices for CDMA-complaint devices and/or cellular service as a result of Qualcomm's licensing practices." *Id.*, ¶ 85.

Claim III: Violation of California's Unfair Competition Law, section 17200, *et seq.*, of the California Business and Professions Code

Qualcomm's CDMA licensing practices are "unlawful, unfair, and deceptive practices." *Id.*, ¶ 87. Qualcomm's licensing practices "are unfair or deceptive business acts or practices because even if Qualcomm's commitment to FRAND licensing was not intentionally false at the time it was made, Qualcomm committed an unfair or deceptive business act or practice by simply reneging on its commitment to FRAND licensing and offering on a discriminatory basis its licenses for the CDMA patents." *Id.*, ¶ 88. Qualcomm's conduct constitutes an unlawful business practice because it "violates federal, state, statutory, regulatory, or common law," and is "unethical, unscrupulous, and substantially injurious to consumers." *Id.*, ¶¶ 89-90. Qualcomm's conduct constitutes a fraudulent business practice because Qualcomm's "conduct was likely to mislead Plaintiff and all others similarly situated by deceiving and leading customers to believe, among other things, that the additional amounts paid by consumer for CDMA-compliant cellular devices and/or cellular services were warranted and appropriate." *Id.*, ¶ 91.

1 Claim IV: Equitable and Injunctive Relief pursuant to Section 16 of the Clayton Act

2 Qualcomm's anticompetitive conduct has "caused artificially high prices for CDMA-
3 compliant devices" and for "cellular services purchased by consumers who buy from carriers
4 which bundle their cellular service with subsidized CDMA-capable devices." *Id.*, ¶ 95.

5 Claim V: Common Law Monopoly

6 Qualcomm "willfully engaged in predatory and anticompetitive conduct intentionally
7 to obtain monopoly power in the relevant market in violation of common law." *Id.*, ¶ 98.
8 Qualcomm has acted "with a specific intent to monopolize the CDMA-chipset market" and has
9 illegally attempted "to monopolize in violation of California common law" through requiring
10 "discriminatory and exclusive licensing agreements." *Id.*, ¶¶ 102-103. Plaintiff and the
11 putative class have suffered injury as a result of Qualcomm's monopoly power and
12 anticompetitive conduct "because they have been, and continue to be, forced to purchase
13 CDMA-complaint devices at a price that is higher because of Qualcomm's royalty, because
14 of the lack of competition in the CDMA-chipset market as a result of Qualcomm's licensing
15 practices, or because the CDMA-chipset market has in otehr ways been harmed by
16 Qualcomm's conduct." *Id.*, ¶ 103.

17 VI: Unjust Enrichment

18 Qualcomm "intentionally offered its CDMA intellectual property rights on a
19 discriminatory and exclusionary basis in order to obtain and maintain an unjust,
20 anticompetitive advantage." *Id.*, ¶ 108. Qualcomm "unjustly obtained a significant benefit as
21 a result of this anticompetitive conduct, including but not limited to, the retention of licensing
22 fees and royalties." *Id.*, ¶ 109.

23 **Procedural History**

24 On January 12, 2009, Qualcomm filed the Motion to Dismiss. On February 2, 2009,
25 Plaintiff filed the Response in Opposition to the Motion to Dismiss (Doc. # 15). On February
26 23, 2009, Qualcomm filed the Reply (Doc. # 16).

Standard of Review

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the pleadings. *See De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978). A complaint may be dismissed for failure to state a claim under Rule 12(b)(6) where the factual allegations do not raise the right to relief above the speculative level. *See Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Conversely, a complaint may not be dismissed for failure to state a claim where the allegations plausibly show that the pleader is entitled to relief. *See id.* (citing Fed R. Civ. P. 8(a)(2)). In ruling on a motion pursuant to Rule 12(b)(6), a court must construe the pleadings in the light most favorable to the plaintiff, and must accept as true all material allegations in the complaint, as well as any reasonable inferences to be drawn therefrom. *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003); *see also Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996).

The allegations in the complaint “may not evade [antitrust] requirements by merely alleging a bare legal conclusion.” *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987). “[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed,” especially in light of the fact that “antitrust discovery can be expensive.” *Twombly*, 550 U.S. at 544. Plaintiffs alleging antitrust claims must set forth enough “factual matter” to “nudge[] their claims across the line from conceivable to plausible.” *Id.* California courts similarly demand a “high degree of particularity in the pleading of Cartwright Act violations.” *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 265 (1983); *see also Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224, 1236 (1993).

Analysis

I. Standing under the Clayton Act and the Cartwright Act

Qualcomm asserts that antitrust standing is a threshold requirement that every plaintiff must satisfy to bring a private suit under the federal and state antitrust statutes. Qualcomm asserts that Plaintiff has failed to satisfy this threshold requirement with respect to Plaintiff’s claim under both the Clayton Act and the Cartwright Act because “Plaintiff effectively

1 concedes that his purchase is too remote from the alleged anticompetitive conduct,” and
2 because Plaintiff has not suffered harm in the “markets for technology and chipsets in which
3 the alleged anticompetitive conduct occurred.” *Mot. to Dismiss*, p. 1-2.

4 Qualcomm contends that for a plaintiff to have antitrust standing, an “injury cannot be
5 secondary, consequential, or remote, but must be the direct result of the unlawful conduct.”
6 *Id.* at 7-8 (internal quotations omitted). Qualcomm contends that “Plaintiff . . . positions his
7 alleged injury at least three levels removed from any alleged misconduct by Qualcomm,” and
8 that Qualcomm’s licensed technology “is not an identifiable, discrete physical product that is
9 simply resold to consumers and that can be traced through one level of distribution.” *Id.* at 8-9.
10 Qualcomm contends that Plaintiff’s injury is too remote to support standing. Qualcomm
11 further contends that the “putative class consists of end consumers in the market for cell
12 phones or cellular service.” *Id.* at 10. Qualcomm contends that “Qualcomm is not alleged to
13 supply cell phones or cellular service or otherwise to participate in either of these markets.
14 Instead, the only alleged wrongdoing is in connection with Qualcomm’s CDMA licensing,
15 which allegedly occurs in two different markets, namely the alleged CDMA patent technology
16 market and the alleged CDMA chipset market.” *Id.* (internal quotations omitted). Qualcomm
17 contends that Plaintiff has failed to allege antitrust injury because Plaintiff fails to allege that
18 he or the class that he purports to represent is a participant in the market where the alleged
19 antitrust violations took place.

20 Plaintiff agrees with Qualcomm that antitrust standing is a threshold requirement to
21 bringing a private action under the federal and state antitrust laws, and asserts that he has
22 satisfied the threshold requirement of adequately alleging antitrust standing with respect to his
23 fourth claim brought under the Clayton Act and first claim brought under the Cartwright Act.
24 Plaintiff contends that he need not be a direct consumer or competitor to bring these claims
25 because indirect purchasers have standing to bring an injunctive antitrust claim under both the
26 federal and state antitrust laws. Plaintiff contends that difficulties in tracing “overcharges for
27 components through a distribution chain” does not preclude standing. *Opposition*, p. 4.
28 Plaintiff contends that “as a direct and foreseeable result of Qualcomm’s anticompetitive

1 licensing practices, Plaintiff and other consumers were forced to pay more for their CDMA-
 2 capable cellular handset devices than they would have otherwise paid.” *Id.* at 7. Plaintiff
 3 contends that “Plaintiff suffered an antitrust injury even though he was not a participant in the
 4 CDMA patent technology market or the CDMA chipset market” because “the impact on the
 5 prices of cellular handsets paid for by the ultimate consumers is clearly foreseeable” and
 6 “injury in the form of higher prices to consumers is within the type of injury that the antitrust
 7 laws are designed to prevent.” *Id.* at 8.

8 A. Standing under the Clayton Act

9 “Antitrust standing” is a threshold requirement that every plaintiff must satisfy to bring
 10 a private suit under the federal antitrust laws. *City of Pittsburgh v. West Penn Power Co.*, 147
 11 F.3d 256, 264 (3d Cir. 1998). Antitrust standing is distinct from Article III standing. “A
 12 plaintiff who satisfies the constitutional requirement of injury in fact is not necessarily a proper
 13 party to bring a private antitrust action.” *Associated General Contractors of California, Inc.*
 14 (“AGC”) v. *California State Council of Carpenters*, 459 U.S. 519, 535, n. 31 (1983).

15 In order to have standing to seek injunctive relief under section 16 of the Clayton Act,¹
 16 a private plaintiff must allege that the plaintiff has “suffered loss or damage of a type the
 17 antitrust laws were designed to prevent and that flows from that which makes defendants’ acts
 18 unlawful.” *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986) (internal
 19 quotations omitted); *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476 (1982)
 20 (antitrust standing requires an “analysis no less elusive than that employed traditionally by
 21 courts at common law with respect to the matter of ‘proximate cause’”). “[I]t is not the status
 22 as consumer or competitor that confers antitrust standing, but the relationship between the
 23 defendant’s alleged unlawful conduct and the resulting harm to the plaintiff.” *American Ad*
 24 *Management, Inc. v. General Telephone Company of California*, 190 F.3d 1051, 1057 (9th Cir.
 25 1999); *In re Warfarin Sodium Antitrust Litigation*, 215 F.3d 395, 400 (3d Cir. 2000) (status as
 26

27 ¹ The Clayton Act “provides a vehicle for private enforcement of the [Sherman Act].”
 28 *Cargill, Inc.*, 479 U.S. at 109. Under section 16 of the Clayton Act, “[any] person, firm,
 corporation, or association shall be entitled to sue for and have injunctive relief . . . against
 threatened loss or damage by a violation of the antitrust laws.” *Id.*

1 an “indirect purchaser” is not “fatal to a plaintiff’s request for injunctive relief under section
 2 16” of the Clayton Act). However, “a plaintiff who complain[s] of harm flowing merely from
 3 the misfortunes visited upon a third person by the defendant’s acts [is] generally said to stand
 4 at too remote a distance to recover.” *Holmes v. Securities Investor Protection Corp.*, 503 U.S.
 5 258, 268-69 (1992).

6 In order to have antitrust standing, the plaintiff must “have suffered its injury in the
 7 market where competition is being restrained. Parties whose injuries, though flowing from that
 8 which makes the defendant’s conduct unlawful, are experienced in another market do not
 9 suffer antitrust injury.” *American Ad Management*, 190 F.3d at 1057; *In re Warfarin*, 215 F.3d
 10 at 400 (“it is not the status as consumer or competitor that confers antitrust standing, but the
 11 relationship between the defendant’s alleged unlawful conduct and the resulting harm to the
 12 plaintiff”). A “narrow exception” exists to this “market participant” requirement “for parties
 13 whose injuries are ‘inextricably intertwined’ with the injuries of market participants” or with
 14 “the injury the conspirators sought to inflict.” *American Ad Management*, 190 F.3d at 1057
 15 (citing *McCready*, 457 U.S. 465). This exception applies when the claimant can be considered
 16 the “direct victim” of a conspiracy or the “necessary means” by which the conspiracy was
 17 carried out. *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 744-47 (9th Cir. 1984) (citing
 18 *McCready*, 457 U.S. at 479). “[T]he simple invocation of [the phrase ‘inextricably
 19 intertwined’] . . . will not allow a plaintiff to avoid the fundamental requirement for antitrust
 20 standing that he or she have suffered any injury of the type - almost exclusively suffered by
 21 competitors - that the antitrust laws were intended to prevent.” *Steamfitters Local Union No.*
 22 *420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 926, n.8 (3d Cir. 1999).

23 The conduct that is at the center of the Complaint is Qualcomm’s alleged
 24 anticompetitive CDMA licensing practices. The Complaint alleges that Qualcomm holds
 25 “certain” patents that it asserts are essential to the CDMA standard. *Complaint*, ¶ 15. The
 26 Complaint alleges that Qualcomm’s licensing practices cause direct anticompetitive harm to
 27 CDMA chipset manufacturers in the form of supracompetitive prices and impaired non-price
 28 competition in innovation of CDMA functionality. The Complaint alleges that “CDMA

1 chipset manufacturers pass CDMA licensing costs down to CDMA device manufacturers,
2 CDMA device manufacturers pass those costs down to their vendors, and the vendors
3 ultimately pass those costs on to end consumers, such as Plaintiff.” *Id.*, ¶ 24.

4 Plaintiff brings this action as an indirect purchaser, on grounds that Qualcomm’s
5 licensing practices indirectly caused Plaintiff to pay supracompetitive prices for his cell phone
6 and cellular service. As alleged in the Complaint, Plaintiff’s end-consumer injury is traced
7 through three levels of the supply chain - chipset manufacturers, device manufactures, and
8 vendors. Furthermore, the technology licensed by Qualcomm to chipset manufacturers is only
9 a component of the technology ultimately creates a chipset, which is then passed on through
10 the supply chain such that Plaintiff’s injury also must be disaggregated from a multitude of
11 other manufacturing and component factors. Although Plaintiff’s indirect purchaser status
12 alone does not preclude antitrust standing, the Court concludes that Plaintiff’s injury as alleged
13 in the Complaint is too remote from Qualcomm’s alleged antitrust violations to support
14 standing under the Clayton Act.

15 The Complaint alleges that Qualcomm’s unlawful licensing practices occurred in the
16 market for CDMA-related patents and technology, and that Plaintiff is an end consumer who
17 suffered injury in the form of anticompetitive prices in the market for cell phones and cellular
18 service. The Court concludes that the Complaint fails to allege sufficient facts to support a
19 finding that Plaintiff is a participant in the market where Qualcomm’s unlawful conduct
20 allegedly occurred. *See American Ad Management*, 190 F.3d at 1057. The Complaint does
21 not allege facts to support a finding that Plaintiff and Qualcomm had a direct relationship, that
22 Qualcomm’s anticompetitive conduct proximately caused Plaintiff’s injury, that Plaintiff is a
23 direct victim of Qualcomm’s anticompetitive conduct, or that Plaintiff is the “necessary
24 means” by which Qualcomm carried out its anticompetitive licensing scheme. *See Ostrofe*,
25 740 F.2d at 755. The Court concludes that the Complaint fails to allege sufficient facts to
26 support a finding that Plaintiff’s alleged injury is inextricably intertwined with Qualcomm’s
27 unlawful conduct so as to fit within the “narrow exception” to the market participant
28 requirement. *American Ad Management*, 190 F.3d at 1057

1 The Court concludes that the Complaint fails to allege the type of injury that the
 2 “antitrust laws were designed to prevent” and that “flows” from the conduct that makes
 3 defendants’ acts unlawful. *Cargill*, 479 U.S. at 113. The Court dismisses the Complaint’s
 4 fourth claim for equitable and injunctive relief pursuant to section 16 of the Clayton Act on
 5 grounds that Plaintiff lacks standing.

6 B. Standing under the Cartwright Act

7 The Cartwright Act “is California’s version of the federal Sherman Act and sets forth
 8 California’s antitrust laws.” *Cellular Plus, Inc. v. Superior Court of San Diego County*, 14
 9 Cal. App. 4th 1224, 1232 (1993). In order for a private plaintiff to have standing to sue under
 10 the Cartwright Act, the plaintiff must prove antitrust injury, “which is to say injury of the type
 11 the antitrust laws were intended to prevent and that flows from that which makes defendants
 12 acts unlawful.” *Id.* at 1234. The Cartwright Act “is patterned after the federal Sherman Anti-
 13 Trust Act . . . , so that decisions under the latter act are applicable to the former.” *Kolling v.*
 14 *Dow Jones & Company, Inc.*, 137 Cal. App. 3d 709, 717 (1982). However, standing under
 15 California’s Cartwright Act is broader than standing under the Sherman Act insofar as the
 16 Cartwright Act explicitly permits indirect purchasers to bring suits for damages and injunctive
 17 relief, whereas an indirect purchaser may only bring suit for injunctive relief under the
 18 Sherman Act. *Cellular Plus*, 14 Cal. App. 4th at 1234. The California courts have held that
 19 a plaintiff whose injuries “were not secondary, consequential, or remote, but the direct result
 20 of the unlawful conduct and were the kind of injuries the antitrust laws seek to prevent” has
 21 antitrust standing. *Id.* at 1233 (citing *Kolling*, 137 Cal. App. 3d at 724) (“Plaintiff’s injuries
 22 were not ‘secondary’ or ‘consequential,’ since they did not result from injury to third parties;
 23 they were not ‘remote,’ for they were the direct result of the allegedly illegal conduct.”).
 24 Although the Cartwright Act “does not confine its protection to consumers, or to purchasers,
 25 or to competitors, or to sellers,” *Cellular Plus*, 14 Cal. App. 4th at 1233, “courts interpreting
 26 the Cartwright Act’s antitrust standing requirement have consistently followed the ‘market
 27 participant’ rule.” *In re Napster, Inc. Copyright Litig.*, 354 F. Supp. 2d 1113, 1125-26 (N.D.
 28 Cal. 2005) (citing *MGM Studios, Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213, 1224 (C.D. Cal.

1 2003). The plaintiff “must show an injury within the area of the economy that is endangered
2 by a breakdown of competitive conditions.” *Kolling*, 137 Cal. App. 3d at 724; *see also Vinci*
3 *v. Waste Management, Inc.*, 36 Cal. App. 4th 1811, 1816 (1995) (plaintiff “was neither a
4 consumer nor a competitor in the market in which trade was restrained”).

5 Plaintiff’s status as an end-user, who purchased indirectly from Qualcomm, is not fatal
6 to Plaintiff’s standing. However, Plaintiff must allege an injury that is not “secondary,
7 consequential, or remote” in order to have standing under the Cartwright Act. *Cellular Plus*,
8 14 Cal. App. 4th at 1233. As alleged in this Complaint, there are at least three intermediaries -
9 CDMA chipset manufacturers, CDMA device manufacturers, and CDMA device vendors -
10 between Plaintiff’s injury and the alleged antitrust violations, and Qualcomm holds only
11 “certain” patents essential to CDMA, such that each device allegedly containing Qualcomm
12 technology also contains other technology which impacts the final price actually paid by
13 Plaintiff. *Complaint*, ¶ 33. The remote nature of Plaintiff’s injuries in relation to the alleged
14 antitrust violations is further demonstrated through the allegations in the Complaint that
15 Plaintiff’s alleged injuries (payment of inflated prices in the market for cell phones and cellular
16 service) occurred in separate market from the alleged antitrust violation (the market for
17 CDMA patents and technology). The Court concludes that Plaintiff’s injuries as alleged in the
18 Complaint are too remote to support standing under the Cartwright Act because Plaintiff’s
19 injuries occurred in a different market from the allegedly anticompetitive conduct, Plaintiff’s
20 injuries are separated by at least three intermediaries to the antitrust violation, and Plaintiff’s
21 injuries were not the direct result of Qualcomm’s allegedly unlawful conduct.

22 The Court concludes the Complaint fails to allege an “injury of the type the antitrust
23 laws were intended to prevent and that flows from that which makes defendants acts
24 unlawful.” *Cellular Plus*, 24 Cal. App. 4th at 1234. The Court dismisses the Complaint’s
25 first claim for violation of the Cartwright Act on grounds that Plaintiff lacks standing.

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1 **II. Standing under California's Unfair Competition Law**

2 Qualcomm contends that Plaintiff lacks standing to pursue a claim under the
3 California's Unfair Competition Law ("UCL"), stating that "[f]or the same reasons that
4 Plaintiff's injury is too remote to support antitrust standing, he also lacks standing to prosecute
5 a claim under California's UCL." *Mot. to Dismiss*, p. 12. Qualcomm contends that Plaintiff
6 has failed to allege proximate cause, which is fatal to his UCL claim which requires that the
7 plaintiff suffer injury in fact and have lost money or property as a result of such unfair
8 competition.

9 Plaintiff contends that the Complaint alleges that Plaintiff was injured when he
10 purchased his Palm Treo 700Wx and his Blackberry Curve in an anticompetitive market.
11 Plaintiff contends that "Qualcomm unlawfully obtained profits from monies in which the
12 Plaintiff and the putative class have a vested interest," which is sufficient to support standing
13 under California's UCL. *Opposition*, p. 10.

14 California's UCL permits civil recovery for "any unlawful, unfair or fraudulent business
15 act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof.
16 Code § 17200. "A private person . . . has standing to assert a UCL claim only if he or she (1)
17 'has suffered injury in fact,' and (2) 'has lost money or property as a result of the unfair
18 competition.'" *Hall v. Time, Inc.*, 158 Cal. App. 4th 847, 852 (2008) (quoting Cal. Bus. & Prof.
19 Code § 17204). The second prong of this standing test "imposes a causation requirement. The
20 phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing
21 of a causal connection or reliance on the alleged misrepresentation." *Hall*, 158 Cal. App. 4th
22 at 855 ("We use the word 'causation' to refer both to the causation element of a negligence
23 cause of action . . . and to the justifiable reliance element of a fraud cause of action.").

24 In *Hall*, the plaintiff alleged that defendant Time, Inc. offered customers a free preview
25 period during which customers could review a book and return it to Time, Inc. with no
26 obligation to buy, and that Time, Inc. engaged in unfair competition by sending the customer
27 an invoice before the end of the free trial period in order to induce the customer to immediately
28 send payment for the book. *Hall*, 158 Cal. App. 4th at 850, 857. The court held that the

1 plaintiff lacked standing under California’s UCL because he “did not allege he did not want
 2 the book or Time’s alleged acts or unfair competition induced him to keep a book he otherwise
 3 would have returned during the free trial period.” *Id.* at 857; *see also Laster v. T-Mobile USA,*
 4 *Inc.*, 407 F. Supp. 2d 1181, 1183 (S.D. Cal. 2005) (“Plaintiffs, however, do not include *any*
 5 allegations in their [first amended complaint] that they relied on Defendants’ advertisements
 6 in entering into the transactions. . . . [N]one of the named Plaintiffs allege that they saw, read,
 7 or in any way relied on the advertisements; nor do they allege that they entered into the
 8 transaction *as a result* of those advertisements.”).

9 The Complaint in this case alleges that Qualcomm made misrepresentations to SDOs,
 10 which relied on Qualcomm’s misrepresentations in incorporating Qualcomm’s technology into
 11 the UMTS standard. The Complaint alleges that Plaintiff purchased a Palm Treo 700Wx and
 12 and Blackberry Curve from Verizon, and receives cellular phone service from Verizon.
 13 Although the Complaint alleges that SDOs relied on Qualcomm’s misrepresentations when
 14 formulating the UMTS standard, the Complaint does not allege that Plaintiff relied on
 15 representations made by Qualcomm when he purchased his cell phone or when he selected his
 16 cellular service. The Complaint does not allege that Plaintiff would not have purchased the
 17 Palm Treo 700Wx or the Blackberry Curve from Verizon, or would not have chosen to receive
 18 cellular phone service from Verizon had Plaintiff been aware of Qualcomm’s
 19 misrepresentations. The Court concludes that Plaintiff has failed to satisfy the second prong
 20 of the test for standing under the UCL because the Complaint does not allege that Plaintiff
 21 relied on any misrepresentation made by Qualcomm. *See Hall*, 158 Cal. App. 4th at 855. The
 22 Court dismisses the third claim for violation of California’s Unfair Competition Law on
 23 grounds that Plaintiff lacks standing.

24 **III. Claim for Violation of the California’s Unfair Practices Act**

25 Qualcomm contends that “secret” is a term of art under California’s Unfair Practices
 26 Act (“California’s UPA”) “referring specifically to conduct in which a supplier tells purchasers
 27 that they are receiving like prices while ‘secretly’ extending discounts to certain favored
 28 purchasers.” *Reply*, p. 9. Qualcomm contends “despite claiming that Qualcomm’s royalty

1 discounts are ‘secret’, Plaintiff recites the relevant terms of the discount and includes
 2 Qualcomm’s public announcement of its terms with the Chinese device manufacturers.” *Mot.*
 3 *to Dismiss*, p. 22 (internal quotations omitted). Qualcomm further asserts that “Plaintiff makes
 4 no attempt to explain how the alleged discounts were somehow ‘unearned,’” stating that “by
 5 contrast, Plaintiff alleges that Chinese manufacturers receive the alleged discount only if they
 6 purchase Qualcomm chips, thus ‘earning’ the discount.” *Id.*

7 Plaintiff contends that “Qualcomm’s royalty discounts are ‘secret’ because the essential
 8 terms of the rebate were not (and are not) known to Plaintiff and the public - especially given
 9 that licensees are bound by non-disclosure agreements.” *Opposition*, p. 18. Plaintiff contends
 10 that the Complaint need not explain how the alleged discounts were “unearned” because the
 11 Complaint alleges that Qualcomm was “secretly extending to certain purchasers special
 12 services or privileges not extended to all purchasers upon like terms and conditions.” *Id.*

13 California’s UPA states:

14 The secret payment or allowance of rebates, refunds, commissions, or unearned
 15 discounts, whether in the form of money or otherwise, or secretly extending to
 16 certain purchasers special services or privileges not extended to all purchasers
 purchasing upon like terms and conditions, to the injury of a competitor and
 where such payment or allowance tends to destroy competition, is unlawful.

17 Cal. Bus. & Prof. Code § 17045. Section 17045 “prohibits a seller from secretly allowing
 18 unearned discounts to a purchaser that injure a competitor and tend to destroy competition.”
 19 *Fisherman’s Wharf Bay Cruise Corp. v. Super. Ct.*, 114 Cal. App. 4th 309, 331 (2003).

20 Plaintiff alleges that Qualcomm’s licensing practices coupled with non-disclosure
 21 provisions constitute the “secret payment or allowance of rebates, refunds, commissions, or
 22 unearned discounts,” which have caused anticompetitive injury. *Complaint*, ¶¶ 83-84.
 23 However, the Complaint does not allege facts to explain how Qualcomm has secretly allowed
 24 unearned discounts to purchasers. Rather, the facts alleged in the Complaint show that any
 25 alleged discounts to purchasers were made public. The Complaint alleges that “Qualcomm has
 26 admitted” that its patent licensing agreements with Chinese cell phone manufacturers “are
 27 expressly discriminatory and explicitly linked to those manufacturers’ use of Qualcomm
 28 chipsets.” *Id.*, ¶ 31. The Complaint further alleges that “Qualcomm publicly summarized” that

1 the “royalty rates provided to certain Chinese manufacturers for products manufactured and
 2 sold in China for use in China are more favorable than [Qualcomm’s] standard rates,” partly
 3 as a result of these manufacturers’ commitment to use Qualcomm chips. *Id.*, ¶ 32. As alleged
 4 in the Complaint, Qualcomm has publicly announced that it provides discounts to some
 5 manufacturers who commit to use Qualcomm chips. The Complaint does not allege facts that
 6 support the existence of secret terms that differ from these publicly announced terms. Viewing
 7 the allegations in the light most favorable to Plaintiff, the Court concludes that the Complaint
 8 fails to allege facts to support a finding that Qualcomm has secretly allowed unearned
 9 discounts from its purchasers. The Court dismisses the second claim for violation of
 10 California’s Unfair Practices Act.

11 **IV. Claim for Common Law Monopolization**

12 Qualcomm contends that California law does not recognize a claim for “common law
 13 monopoly.” *Mot. to Dismiss*, p. 18. Qualcomm further contends that Plaintiff’s “bundled
 14 discount theory” fails to “support a monopolization claim” because the Complaint does not and
 15 cannot allege that “the discounts result in prices that are below an appropriate measure of the
 16 defendant’s costs.” *Id.* at 8.

17 Plaintiff contends that California courts do recognize the common law tort of
 18 monopolization. Plaintiff asserts that “there is authority supporting the proposition that
 19 monopolization is prohibited as against public policy under California common law, and that
 20 a business tort of monopolization may be recognized under California law separate and apart
 21 from statutory claims arising under the Cartwright Act.” *Opposition*, p. 14. Plaintiff contends
 22 that the Complaint’s allegations with respect to Qualcomm’s bundled discount theory are
 23 sufficient to state a claim for common law monopolization.

24 The district court in *In re: Intel Corp. Microprocessor Antitrust Litigation v. Intel*
 25 *Corporation*, 496 F. Supp. 2d 404, 420 (Del. 2007), concluded that a “[c]laim for damages
 26 based upon the common law tort of monopolization is not cognizable under California law.”
 27 Noting that “there is no direct precedent from the California Supreme Court or the California
 28 Courts of Appeals on the question of whether California recognizes a common law claim for

1 damages based upon monopolization,” the *Intel* court distinguished the cases relied on by
 2 Plaintiff in the Opposition. *Id.* at 419. The *Intel* court stated that neither *Burdell v. Grandi*,
 3 152 Cal. 376 (1907), nor *Exxon Corp. v. Superior Court*, 51 Cal. App. 4th 1672 (1997),
 4 “actually analyzes whether a monopolization claim is available under California law in the first
 5 instance.” *Intel*, 496 F. Supp. 2d at 419. The *Intel* court stated:

6 In *Burdell*, the California Supreme Court found that a restrictive covenant in a
 7 lease that was intended to create a monopoly was void, but it did not address the
 8 availability of damages for a monopoly claim. Similarly, in *Exxon*, the court
 9 concluded that the plaintiff’s monopoly claim could not survive summary
 10 judgment, but did not actually address whether such a claim was cognizable
 11 under California law because no such challenge was made to the claim.

12 *Id.* The *Intel* court acknowledged the that *Natural Gas Anti-Trust Cases I, II, III and IV*, 2002
 13 WL 31570296 (Cal. Super. Ct. Oct. 16, 2002), refused to strike a claim alleging the common
 14 law tort of monopolization, but stated that “[m]ore recently,” *Branning v. Apple Computer*,
 15 *Inc.*, 1-05-cv-045719 (Cal. Super. Ct. May 9, 2006), concluded that “there is no cause of action
 16 for common law monopoly under California law.” In holding that a cause of action for
 17 common law monopoly was not actionable under California law, the *Branning* and *Intel* courts
 18 pointed to the legislative history concerning an attempt in 2002 to amend the Cartwright Act,
 19 where the Attorney General of the State of California reported to the Senate that “[a]ccording
 20 to the Attorney General’s Office, the remedies for illegal monopolization are limited under
 21 current law to relief in a federal court.” *Intel*, 496 F. Supp. 2d at 419 (quoting Assembly
 22 Comm. on Bus. & Profs., 2001-2002 Reg. Session, analysis of Senate Bill 1814, at 3 (June 25,
 23 2002); *Branning*, 1-05-cv-045719; see also *Dimidowich v. Bell & Howell*, 803 F.2d 1473,
 24 1478 (9th Cir. 1986) (holding that plaintiff’s “monopoly arguments fail to state a cognizable
 25 claim under California law” because plaintiff’s monopoly claim was “not cognizable under the
 26 Cartwright Act, for it fails to allege any combination”).

27 The cases cited by Plaintiff to support his assertion that a common law monopolization
 28 claim is available under California law do not analyze the issue. In the absence of California
 Supreme Court law to the contrary, this Court finds the reasoning in *Intel* and *Branning* to be
 persuasive. The Court finds further support for the conclusion that a claim for common law
 monopoly is not cognizable under California law in the Ninth Circuit’s holding in *Dimidowich*,

1 803 F.2d at 1478. In light of the foregoing, the Court concludes that Plaintiff may not maintain
 2 a monopoly claim based upon California common law. The Court dismisses the fifth claim for
 3 common law monopolization.

4 **V. Claim for Unjust Enrichment**

5 Qualcomm contends that a cause of action for unjust enrichment does not exist in
 6 California. Qualcomm contends that “[r]ather, unjust enrichment is a remedy typically sought
 7 in connection with a ‘quasi-contractual’ claim whereby, in the absence of a valid contract
 8 covering the subject matter of the plaintiff’s claim, a party can obtain restitution of a benefit
 9 unjustly conferred upon the defendant.” *Mot. to Dismiss*, p. 25. Qualcomm contends that
 10 Plaintiff does not allege any contractual or quasi-contractual relationship with Plaintiff; rather
 11 “Plaintiff’s only contractual relationship is with his cellular service provider.” *Id.*

12 Plaintiff contends that “California law recognizes that an individual is required to make
 13 restitution if he or she is unjustly enriched at the expense of another.” *Opposition*, p. 20.
 14 Plaintiff contends that the Complaint states a claim for unjust enrichment because “Plaintiff
 15 alleges that Defendant is wrongfully in receipt of money, namely profits resulting from
 16 supracompetitive prices consumers paid for CDMA-complaint devices, which for
 17 considerations of equity and in light of Defendant’s alleged conduct, would be unjust for it to
 18 retain.” *Id.* at 21.

19 “[T]here is no cause of action in California for unjust enrichment.” *Melchior v. New*
 20 *Line Productions, Inc.*, 106 Cal. App. 4th 779, 794 (2003). “The phrase ‘Unjust Enrichment’
 21 does not describe a theory of recovery, but an effect: the result of a failure to make restitution
 22 under circumstances where it is equitable to do so.” *Lauriedale Associates, Ltd. v. Wilson*, 7
 23 Cal. App. 4th 1439, 1448 (1992). “Unjust enrichment is a ‘general principle, underlying
 24 various legal doctrines and remedies,’ rather than a remedy itself.” *Melchior*, 106 Cal. App.
 25 4th at 784 (quoting *Dinosaur Development, Inc. v. White*, 216 Cal. App. 3d 1310, 1315
 26 (1989)). Unjust enrichment is typically sought in connection with a “quasi-contractual” claim
 27 in order to avoid unjustly conferring a benefit upon a defendant where there is no valid
 28 contract. *McBride v. Boughton*, 123 Cal. App. 4th 379, 388 (2004).

1 The Complaint alleges a claim for unjust enrichment, and seeks to recover on grounds
 2 that as a result of Qualcomm's anticompetitive conduct, Qualcomm has "benefitted and has
 3 been unjustly enriched" at the expense of consumers. *Complaint*, ¶¶ 108-111. However, a
 4 cause of action for unjust enrichment is not cognizable under California law. *See Melchior*,
 5 106 Cal. App. 4th at 794. Furthermore, the Complaint does not allege any contractual or quasi-
 6 contractual relationship between Plaintiff and Qualcomm. The Court concludes that Plaintiff
 7 may not maintain a claim based on unjust enrichment. The sixth claim for unjust enrichment
 8 is dismissed.

9 **VI. Leave to Amend**

10 Plaintiff requests leave to amend "[s]hould the Court grant Defendant's motion in whole
 11 or in part." *Opposition*, p. 21. Plaintiff contends that Qualcomm has not shown that
 12 amendment is futile. Qualcomm opposes leave to amend, stating that "[a]lthough Plaintiff's
 13 Opposition includes a boilerplate request for leave to amend, any leave would be improper
 14 under these circumstances, as the brief fails to identify anything Plaintiff could plausibly allege
 15 that would remedy the defects in the Complaint." *Reply*, p. 10.

16 Rule 15 of the Federal Rules of Civil Procedure mandates that leave to amend "be freely
 17 given when justice so requires." Fed. R. Civ. P. 15(a). This policy is applied with
 18 "extraordinary liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079
 19 (9th Cir. 1990). Once an answer to the complaint has been filed, as is the case here, courts
 20 may deny leave to amend where the proposed amendment would be futile, where it is sought
 21 in bad faith, where it will create undue delay, or where "undue prejudice to the opposing party
 22 will result." *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973); *see also Johnson*
 23 *v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992).

24 Qualcomm does not assert that amendment is sought in bad faith, will create undue
 25 delay, or would prejudice Qualcomm. The Court grants Plaintiff leave to amend.

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Conclusion

IT IS HEREBY ORDERED that the Motion to Dismiss (Doc. # 15) is **GRANTED**.

The above-captioned action is DISMISSED with leave to amend. Plaintiff may file a first amended complaint within thirty (30) days of the date of this Order.

DATED: March 3, 2009


WILLIAM Q. HAYES
United States District Judge